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*In The*
*Supreme Court of the United States*
*October Term 1996*

JACK KEVORKIAN,
*Petitioner,*

v

STATE OF MICHIGAN,
*Respondent.*

On Petition for a Writ of Certiorari to
the Michigan Supreme Court

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

### I.

DOES AN INJUNCTION WHICH PROHIBITS, INTER ALIA, "OFFERING" OR "CONDUCTING *ANY ACTS* TO HELP A PATIENT COMMIT SUICIDE REGARDLESS OF THE MODALITY EMPLOYED" IMPERMISSIBLY BURDEN FIRST AMENDMENT RIGHTS?

### II.

DO THE PRIVACY AND LIBERTY INTERESTS PROTECTED BY THE NINTH AND FOURTEENTH AMENDMENTS INCLUDE THE RIGHT OF A MENTALLY COMPETENT ADULT WHO IS TERMINALLY ILL OR SUFFERING INTRACTABLE, INTOLERABLE PAIN WITH NO CHANCE OF RECOVERY, TO END THEIR SUFFERING BY ENDING THEIR OWN LIFE?

### III.

IS THE EQUAL PROTECTION CLAUSE VIOLATED BY PREMISING THE FREEDOM TO CHOOSE TO HASTEN DEATH SOLELY ON THE BASIS OF WHETHER A PARTICULAR DISEASE REQUIRES THE USE OF LIFE-SUSTAINING TREATMENT SUCH AS A BREATHING OR FEEDING TUBE?

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**IN THE SUPREME COURT OF THE UNITED STATES**
OCTOBER TERM, 1996

JACK KEVORKIAN, Petitioner,

v.

STATE OF MICHIGAN, Respondent.

## OPINIONS BELOW

The Opinion and Order of the Oakland County Circuit Court are not published. (App., *infra,* 12 & 1). The Opinion of the Michigan Court of Appeals (App., *infra,* 3 ) appears at 210 Mich. Ct. App. 601, 534 N.W. 2d 172 (1995). The Michigan Supreme Court Denial of Leave to Appeal appears at 1996 Mich. LEXIS 769. (App., *infra,* 2).

## JURISDICTION

The judgment of the Michigan Court of Appeals was entered on May 12, 1995. The Michigan Supreme Court denied leave to appeal on April 26, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a) in that the highest court of Michigan denied a hearing in the face of a challenge alleging that an injunction entered against Dr. Jack Kevorkian was repugnant to the Constitution of the United States.

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved here include the First, Ninth and Fourteenth Amendments and prohibitions against laws which are vague and overbroad. (App., *infra,* 33)

## STATEMENT OF THE CASE

Petitioner, Jack Kevorkian, M.D., is a graduate of the University of Michigan School of Medicine. He has become known, throughout the United States and the rest of the world, as the leading exponent on the rights of competent adults to end intolerable and irremediable pain and suffering. Receiving hundreds of requests for assistance every year, Dr. Kevorkian has limited his practice to those who have explored all other reasonable courses and who have not gained relief. Most of his patients go on and die naturally, knowing he will be there if they need him.

The patients who consult with Dr. Kevorkian suffer from frightful diseases which have completely destroyed their ability to lead lives free of constant physical torture and misery. These patients are actively smitten with afflictions so horrendous as to preclude any semblance of the enjoyment of life.

Before he will provide patients with assistance, Dr. Kevorkian engages in a rigorous screening process to ensure that the patients have attempted all other reasonable methods of alleviating the pain and torture of their diseases. In each case, Dr. Kevorkian engages in counseling and ensures that the patient is (a) competent; (b) fully informed as to the ramifications of the termination of life; (c) assured that termination of life was not desired by Dr. Kevorkian and that Dr. Kevorkian did not advocate that the patient commit suicide; (d) not subject to coercion or duress; (e) making the decision of his or her own free will, voluntarily and based upon a full explanation of the situation involved; (f) definite and not tenuous with respect to the decision to end suffering through the termination of life; and (g) given a full opportunity to consult with family members, clergy, and other persons from whom the patient may have wished to seek advice and counsel.

Prior to the issuance of the injunction on February 5, 1991, Dr. Kevorkian had assisted one patient, Janet Adkins, who was suffering from Alzheimer's Disease, a degenerative

and ultimately fatal disease. At the time that Janet ended her suffering, she was mentally competent and fully cognizant of the ramifications of ending her life. She did not wish to have the cruelties of her disease further inflicted upon her. Prior to consulting with Dr. Kevorkian, she underwent extensive treatment with other physicians who were unable to prevent the progression of her degenerative disease. While she was still mentally and physically capable of doing so, Mrs. Adkins chose to end her suffering by seeking Dr. Kevorkian's assistance. She was supported in her decision by her husband, her children and her best friend. She traveled from Oregon to Michigan with her husband and ended her suffering on June 4, 1990. The Constitutionally offensive injunction was issued thereafter.

## PROCEEDINGS BELOW

On June 6, 1990, Respondent filed a complaint for injunctive relief and a motion for a temporary restraining order. The temporary restraining order was not granted, but the trial court did issue an order to show cause why a preliminary injunction should not be issued. At the conclusion of the hearing on June 8, 1990, at which Petitioner testified, *without counsel, advice that he should retain counsel or notice that he might incriminate himself,* the Oakland County Circuit Court issued a preliminary injunction temporarily enjoining Petitioner, inter alia, from "conducting any acts to help a patient commit suicide regardless of the modality employed."

Trial was held on Respondent's request for injunctive relief in January 1991. The Petitioner did not testify at that trial, and contended that the admission into evidence of his testimony from the hearing on the motion for temporary injunction was in violation of his Fifth Amendment right against self incrimination. On February 5, 1991, the Circuit Court issued an opinion and ordered that the temporary injunction be made permanent. The opinion recognized there may be an individual liberty interest in the right to die, but concluded that this interest

was outweighed by the State's interest in preserving life and protecting innocent third parties. (App., *infra,* 25). The Court noted the "critical difference between the present situation (physician assisted suicide) and prior cases which have upheld the individual's rights of privacy and self determination: the fact that Dr. Kevorkian is the party to this case and to the proposed procedure evidences that the asserted rights at stake are not the rights of privacy and self-determination. The terms "privacy" and "self-determination" belie the participation of another individual. . . patients can not confer a right upon a doctor to assist suicide." (App., *infra,* 25). This reasoning is contrary to this Court's line of abortion cases, which hold that the rights of privacy and self determination necessarily encompass a right to physician aid. *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992).

The Circuit Court noted that the right to remove life support and refuse medical treatment flow from the accepted tenet that the state may not invade bodily integrity. The Court went on: "In the present case, however, there is no state-threatened invasion of the body." (App., *infra*, 25) This is a superficial distinction and violative of Equal Protection. There is a state invasion of bodily integrity and bodily autonomy when it prevents a mentally competent adult from *seeking* medical treatment, just as there is when the state prevents a person from *refraining* from medical treatment.

Petitioner sought review from the Michigan Court of Appeals, arguing that the Circuit Court erred both by denying Petitioner's Motion for Summary Disposition and by issuing a permanent injunction which violated Petitioners right to Free Speech. (App., *infra,* 31). On May 12, 1995 the Court of Appeals issued its opinion, which upheld the rulings of the Circuit Court. At the time of the Court of Appeals decision, the Michigan Supreme Court had just remanded criminal cases against the Petitioner to the Circuit Courts, holding that he could be tried under various Michigan Statutes, and the Common Law.

In light of that recent opinion the Court of Appeals stated "it is now clear that Dr. Kevorkian's claimed legal act was in fact illegal" (App., *infra,* 6) (in fact, on remand, Dr. Kevorkian was acquitted of *all* charges). Although the Court of Appeals cited to other physician assisted suicide cases, recognizing the need to address the fundamental issues involved therein, they avoided the question and held that the lower court ruling could be affirmed because Dr. Kevorkian's action constituted a "threatened violation of life and law" based upon the remand of the criminal charges by the Michigan Supreme Court. The Court of Appeals utterly failed to address the Freedom of Speech issue.

Petitioner applied for Leave to Appeal to the Michigan Supreme Court, raising again the argument that the injunction contained broad, sweeping language that would interfere with Dr. Kevorkian's right to discuss suicide and the means to commit suicide with others. (App., *infra,* 31). On April 26, 1996, the Michigan Supreme Court denied leave to appeal.

## REASONS FOR GRANTING THE PETITION

**I. Certiorari should be granted to answer the critical question of our time: does a competent adult have a constitutionally protected right to end intolerable pain or suffering, even though the end of such pain or suffering may involve the ending of one's life?**

### A. The privacy and liberty interests protected by the Ninth Amendment and the Due Process Clause encompass the right of a mentally competent, suffering adult to hasten their own death.

Emanating from our Constitution are implied rights and interests that are no less important to individual liberties than those specifically provided in the Bill of Rights. The Ninth Amendment is the historical recognition that additional rights exist outside the Constitution's plain wording. "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional Amendments." *Griswold v. Connecticut,* 381 U.S. 479, at 488 (1965).

The first step in a Substantive Due Process analysis is to determine whether there is a "liberty interest." If a liberty interest is found, the second step is to balance the liberty interest against the relevant state interests. *Youngberg v. Romeo,* 457 U.S. 307, 321 (1982). As Justice O'Connor explained in her concurring opinion in *Cruzan*, the ultimate question is whether sufficient justification exists for the intrusion by the government into the realm of a person's "liberty, dignity and freedom." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, at 287, 289 (1990) (O'Connor concurring).

Justice Stevens observed that "the concept of privacy embodies the moral fact that a person belongs to himself and

not others not to society as a whole." *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747, 777, n. 5 (1986). The right to privacy, and the concomitant right of liberty from interference with it, are well established. This Court has historically protected personal choices through interpretation of the Fourteenth Amendment. *See, Loving v. Virginia,* 388 U.S. 1 (1967) [There is a fundamental right to marry a person of another race.]; *Griswold,* 381 U.S. 479 [Married persons have the right to receive medical advice regarding contraception]; *Eisenstadt v. Baird,* 405 U.S. 438 (1972); [Extending the right to unmarried persons].

Under the Fourteenth Amendment there is a line of cases protecting a person's right to personal autonomy, self-determination and bodily integrity. Part of the right to personal autonomy is the right to refuse unwanted medical treatment, *Washington v. Harper,* 494 U.S. 210 (1990), and, of course, the right to choose an abortion, *Roe v. Wade*, 410 U.S. 113 (1973). "In the ordinary course of existence, some decisions remain so personal in nature that society is not in a position to make judgments about their appropriateness. It is difficult to imagine a more personal or intimate choice than determining the nature or extent of one's suffering. . ." *People v. Kevorkian,* 205 Mich. App. 194, 518 N.W.2d 487 (1994).[1] The individual liberty interest in ending one's own suffering during terminal illness

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[1]There are many analogies made between abortion and physician assisted suicide because they involve so many of the same issues: liberty, privacy, bodily autonomy, and protection of life. However, one cannot rationally recognize a liberty which permits a woman control over her body even though it may infringe upon a third party, and not allow a mentally competent adult control over their own body when it does not involve any other "person." Also, the common foe to both rights are generally those whose beliefs prevent them from recognize the freedoms of others, and compel them to vehemently oppose both.

or intractable pain lies within the penumbras of the Ninth and Fourteenth Amendments.

Turning to the second step of Due Process analysis, it is impossible to find that these personal, intimate and painful choices can possibly be outweighed by the states interest in preserving life at any cost. In reaffirming the central holding of *Roe*, this Court noted that pregnancy involves "suffering [that] is too intimate and personal for the state to insist . . . however dominant that vision has been in the course of our history and culture." *Planned Parenthood v. Casey, supra,* at 852. The major opponents of abortion claim that the state must protect the rights of the fetus, who is unable to defend itself. In opposing physician assisted suicide, whom are they protecting? Certainly, it is not the competent adults begging to be released from their tormented bodies.[2] Prolongation of life may cause loss of dignity, unnecessary pain and suffering, while providing nothing beneficial to the patient. Equally important, the state does not benefit from prolonging life under these circumstances.

The state claims that the poor and disadvantaged may be pressured into committing physician assisted suicide and therefore we should not allow it. This same argument was advanced against recognizing abortion rights.[3] Physician assisted suicide is a medical service. The argument that the poor and disadvantaged will receive *more* medical services than the remainder of the population is ludicrous on its face. *Compassion in Dying,* 79 F.3d 790 at 905 (9th Cir. 1996). It is also unacceptably paternalistic. We must trust competent adults

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[2]It is worth noting that in finding a right to abortion this Court weighed the viability of the fetus against the autonomy of the mother. When viability is so diminished, as with the terminally ill, the interest in protecting life is clearly outweighed by right to autonomy.

[3]In fact, a quick perusal of *Roe, supra,* reveals the arguments against assisted suicide are virtually identical to the arguments against abortion.

to make decisions about their own medical needs.

The state has an interest in protecting life. However, the state's interests lose considerable weight when "the choice remaining is not between life and death, but over the terms of the death." *Compassion in Dying,* 79 F.3d 790 at 886.

As advances in science and medicine out-pace the evolution of society, courts are faced with the dilemma of fixing a balance between individual liberty and the State's exercise of its police powers. In performing this juggling act, courts often have been asked to make decisions that will ultimately result in both the end of suffering for a patient and the concomitant end of life. *See, Cruzan,* 497 U.S. 261.

Courts have ordered the discontinuance of life-sustaining medical treatment — an order that inevitably leads to the death of the patient. In reaching such difficult decisions, the court must often determine the wishes of the unconscious suffering patient, who is not always capable of expressing those wishes. The patient-advocate law represents one way in which the Michigan legislature has attempted to address the difficult issues created by modern medical technology. M.C.L. 700.496; M.S.A. 27.5496.

When does the individual's interest in freedom from unjustifiable State interference in personal decision-making outweigh the State's interest in protecting the public health, morals, safety and general welfare? Some would argue that the State has never had the authority to limit or define the liberty interests of the people. Government only has the power which has been delegated by the people and we have never abdicated our right to self-determination. U.S. Const. Amend. IX. Others argue that we only enjoy those freedoms which have been specifically enumerated in the Bill of Rights. Such an argument ignores the very principles upon which the government of this nation was established, would render nugatory the Ninth Amendment to the Constitution of the United States, and would turn on its head the fundamental principle that government is supposed to serve the people, not the other way around.

Following the reasoning of this Court over the past few decades, the State may not intrude into certain personal decisions regarding family, parenthood and bodily integrity. *See, Casey, supra,*. Such reasoning is based on the premise that government cannot govern that which it lacks the power to govern.

The ancient liberty interests of self-realization and self-determination were recognized by the framers of the Constitution. This Court's decisions have not created new rights. This Court's decisions merely have pulled in the reins on a government gone wild; on a government bent on governing where it has no authority to govern; on a government intent upon inculcating personal religious beliefs into the law of the land.

This Court should follow the "essential holdings" of its recent cases that have espoused a right to be free from unwarranted, State-imposed limitations on the exercise of personal liberty, and find that the State of Michigan cannot unreasonably infringe upon a competent adult's decision to end personal suffering through the end of life. *See, Loving v. Virginia,* 388 U.S. 1; *Griswold v. Connecticut,* 381 U.S. 479; *Eisenstadt v. Baird,* 405 U.S. 438.

Indeed, the State arguably has a legitimate interest in protecting life under certain circumstances.[4] For example, the State health code, homicide laws, and regulation of the medical professions are designed to protect life. Does the State's interest in protecting life, though, extend so far as to include an interest in prolonging suffering? Does the State have a legitimate interest in forcing its citizens to endure agonizing pain, suffering and debilitation in the name of protecting life?

In No. 84 of *The Federalist,* Alexander Hamilton assured the people that the authority vested in the new government did not create a sovereign to which the people would become subservient, with the abdication of all rights save those

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[4]Interestingly, no state in this union criminalizes suicide or attempted suicide; no matter how irrational.

specifically reserved by a bill of rights. Hamilton and the other founders of this nation subscribed to the philosophy that men and women, in their natural state, were free beings. The framers subscribed to the notion of the inalienable rights of self-realization and self-determination. The Bill of Rights is not a license, it is not an expression of privilege. The Bill of Rights and subsequent amendments to the Constitution are an expression of a check on the power of government.

The State has advanced the argument that only those rights specifically enumerated in the Constitution are afforded constitutional protection. Hamilton recognized the danger of this argument when he wrote concerning the freedom of the press:

> Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, **to men disposed to usurp, a plausible pretense for claiming that power.** They might urge with a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a power to prescribe proper regulations concerning it was vested in the national government. [Emphasis supplied.]
>
> THE FEDERALIST No. 84 (Alexander Hamilton).

Over the past few decades, this Court and the other courts of this nation have addressed issues of personal autonomy under the precepts of the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. The right to self-determination has been said to be found within the zone of privacy inherent in the First and Ninth Amendments, and within the substantive due process and equal protection guarantees of

the Fifth and Fourteenth Amendments.

The First Amendment has a penumbra wherein privacy is protected from governmental intrusion. *Griswold,* 381 U.S. 479. This zone of privacy emanates from the specific guarantees of the Bill of Rights. *Poe v Ullman,* 367 U.S. 497 (1961). The courts have addressed many controversies over the penumbral rights of "privacy and repose." *Griswold,* 381 U.S. at 485. Ultimately, the right to be free from governmental intrusion upon one's own body is secured by the privacy rights which emanate from the liberty provisions of the First and the Fifth Amendments.

The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Thus, in plain English, the Founding Fathers consigned to the rubble heap the notion that a right must be specifically enumerated in the Constitution in order for the people to possess it. The right to end suffering need not be specifically guaranteed by the Constitution, for it may be found within the penumbra of privacy and freedom recognized and protected by the Ninth Amendment.

This Court has never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name. *Griswold,* 381 U.S. at 486, n 1. The Fourteenth Amendment declares that no State shall "deprive any person of life, liberty, or property, without due process of law." The Due Process Clause has been understood for well-over a century to contain a substantive component as well as a procedural one. The Due Process Clause also bars "certain government action regardless of the fairness of the procedures used to implement them." *Daniels v Williams,* 474 U.S. 327 (1986).

All fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. *Whitney v California,* 274 U.S. 357, 373 (1927). "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey,* 503 S Ct

at 847. As was recognized by Justice Harlan over thirty years ago:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This liberty' is not a series of isolated pointspricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a **rational continuum** which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a **reasonable and sensitive judgment** must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. (Emphasis supplied.)
> Poe, 367 U.S. at 543 [Harlan, J., dissenting.]

Dr. Kevorkian asserts that, absent a compelling state interest, government is without power to abridge an individual's right to self-determination. The individual's liberty interest in self-determination cannot be made subject to the whims of "men disposed to usurp" the power retained by the people. The State would urge this court to legitimize the usurpation of power by men claiming that only God can determine the time of death, that the people never have possessed the right to self-determination, and that those professing such a right are guilty of blasphemy. Undoubtedly, there are those on this Court who feel similarly. It is also clear that those on this Court who so believe will deny such beliefs and seek to impose governmental control over bodily function under a set of inane justifications intended to obfuscate the real reasons.

"It is settled now . . . that the Constitution places limits on a State's right to interfere with a person's most basic decisions

about family and parenthood, . . . **as well as bodily integrity.**" [Emphasis supplied.] *Casey,* 505 U.S at 849.

In dealing with the issues of the cessation of life-sustaining medical treatment, this Court has addressed whether a state may require proof, by clear and convincing evidence, of an individual's wishes regarding the withdrawal of such treatment. *See, Cruzan,* 497 U.S. 261. In addressing the question, this Court acknowledged that a competent person has a liberty interest under the Due Process Clause in refusing unwanted medical treatment. *Cruzan,* 497 U.S. at 270.

A competent individual has a liberty interest in refusing unwanted medical treatment, including treatment that often means the difference between life and death. A person can discontinue life-sustaining treatment, an act that inevitably ends in death. In order to discontinue the treatment, a doctor or other health care professional must disconnect the apparatus that is supplying the treatment. The act of disconnecting the life-sustaining treatment is no different from the act of connecting a life-ending apparatus. To attempt to distinguish between withdrawing life-support thereby suffocating or starving an unconscious patient to death, and not providing similar means to a conscious suffering patient, is absurd. *See, Cruzan,* 497 U.S. at 292-301 [Scalia, J., concurring.] In fact, for thirteen years, Michigan Right-to-Life held up passage of the Patient Advocacy/Living Will bill in Michigan by falsely claiming that withdrawing life-support was murder. If abortion is a fundamental right (and it arguably involves a third party), *Casey, supra;* if withdrawing life support to surely cause death is a fundamental right, *Cruzan, supra;* then controlling one's own life certainly must be fundamental. To find otherwise would be irreconcilable with this Court's decisions in *Casey* and *Cruzan.*

If an individual may designate a third party to order discontinuation of life-sustaining treatment when the individual is no longer capable of expressing the desire to refuse treatment, why cannot a competent person request assistance in ending

the suffering pain of his or her affliction? Why does the State's interest in protecting life extend to one act and not to the other?

The constitutional issues raised in this Petition have been addressed by the United States Court of Appeals for the Ninth Circuit in *Compassion in Dying,* 79 F.3d. 790. The plaintiffs in that case asserted that the Fourteenth Amendment to the United States Constitution guarantees adults who are mentally competent, terminally ill, and acting under no undue influence, the right to voluntarily hasten their death by taking a lethal dose of physician-prescribed drugs, and on equal protection grounds. *Compassion in Dying, supra..* The Court of Appeals, following the reasoning espoused by this court in *Casey*, found that the right to end one's suffering during a terminal illness is embodied in the liberty interests protected by the Fourteenth Amendment.

This Court, in *Casey,* pronounced the following:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. **At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."** [Emphasis supplied.]
> *Casey,* 505 US. at 851.

The Court therefore found unconstitutional a state statute imposing criminal sanctions for physician-assisted suicide. *Compassion in Dying, supra.*

This Court's decision in *Cruzan* is also instructive. In *Cruzan,* this Court had to decide whether a competent person has a constitutionally protected liberty interest in refusing unwanted, life-sustaining medical treatment including artificially delivered nourishment essential to life. In the

majority opinion written by Chief Justice Rehnquist, this Court acknowledged that the logic of its prior decisions embraced just such a liberty interest. This Court held that the United States Constitution grants a competent person the right to refuse life-sustaining medical treatment. *Cruzan*, 497 U.S. at 278-279.

In Oregon, on November 8, 1994, the citizens of that State, recognizing the need for compassion and flexibility in situations involving terminal illnesses, approved a provision which specifically permitted medical assistance in ending life under specified guidelines. The effective date of that law has been stayed pending litigation which may eventually find its way to this Court.

In *Quill v Vacco*, 80 F.3d 716 (2d Cir. 1996), the United States Court of Appeals for the Second Circuit declared unconstitutional New York statutes which prohibited physicians from assisting in suicides of terminally-ill, mentally competent patients who voluntarily elected to forgo the ravages of disease and the concomitant pain and suffering by ending their lives.

In certain cases, the only realistic means of alleviating the pain and suffering is termination of life. If the choice is between ending the pain and suffering through termination of life on the one hand, and continuing horrendous suffering on the other, some competent adults, freely, knowingly and voluntarily will choose not to suffer. Not everyone so afflicted has the ability to end the suffering by themselves. The question is whether government should or may impose itself on these people to force them to suffer against their will. It cannot.

**B. It is a denial of Equal Protection to afford to persons on life support the right to hasten their death, with the assistance of others, while denying such right to those suffering from terminal illness or intractable pain and agony but who are not on life support.**

When a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction rationally furthers a legitimate state purpose. See, *Hooper v. Bernalilo County Assessor,* 472 U.S. 612.

This Court, in *Cruzan*, held that persons who are on life support have a right to have such life support terminated if they had indicated clearly and unequivocally that they wished to do so. *See, Cruzan*, 497 U.S. 261. Justice Scalia recognized that distinguishing between assisted suicide and termination of life support was a distinction without a difference. It is generally recognized that removal from life support will hasten death in most cases. Thus, if a person is on life support, under *Cruzan* that person will be able to receive assistance in hastening death and terminating life.

If it is permissible for a person who is on life support to receive assistance in terminating life, why is it impermissible for one not on life support to receive the same type of assistance? The person who is not on life support undoubtedly suffers far more than a person who has lost consciousness. The person who is not on life support may have a far more compelling reason to end life than one who is comatose and on life support. To give a right to the comatose person on life support which right is not afforded to the consciously suffering individual who is not on life support is a denial of equal protection.

There is no rational basis upon which the state can compel one who is consciously suffering to continue that suffering while allowing the person who is not consciously suffering the option of ending his or her existence. The state should have no interest in the prolongation of conscious suffering which cannot reasonably be relieved.

Yet, by enjoining Dr. Kevorkian from even providing information to those who are consciously suffering to end that suffering, the State, through the injunctive process, impermissibly deprives those persons from gaining access to

relief from suffering while allowing those who do not consciously suffer the ability to gain relief by ending their lives.

To elevate the rights of those who do not consciously suffer over the rights of those who are subject to conscious suffering is without a compelling state interest and violates the Equal Protection Clause.

Those who oppose physician aid in dying have attempted to distinguish the removal of life support and the provision of lethal doses of medication by which a patient may self administer relief by claiming that the first is *omission*, while the latter is *commission*. They propose that the omission is not physician assisted suicide because it merely allows the patient to die of natural causes. However, it is clear that withdrawing food, water or respiration is not an omission, it is an overt act. Furthermore, this distinction results in allowing a person to choke or starve to death, but not to self-administer medication so that they may die painlessly and quickly. This can not possibly be the result that is intended. *Cruzan* should not be read as a half step when that would result in greater suffering. Additionally, this distinction fails to recognize that in both situations the death of the suffering patient is the intended/known end. Moreover, the writing of a prescription to hasten death involves a far less active role for the physician than asphyxiation, starvation and/or dehydration. It simply can not be said that those mentally competent, physically suffering adults, who seek to hasten death but whose treatment does not include life support are treated equally.

After finding unequal treatment, the next step is to assess if it is rationally related to some legitimate state interest. Michigan has contended that it has an interest in preserving the life of all its citizens at all times and under all conditions. But what interest can the state possibly have in requiring the prolongation of a life that is all but ended? Surely, the state's interest lessens as the potential for life diminishes. See, *In re Quinlan,* 70 N.J. 10, 41, cert. denied, 429 U.S. 922 (1976).

Society should be concerned for unsolicited death, but

this concern can be placated by insuring review of the desire to end life. The argument that a doctor cannot draw a line between people who are terminally ill or intractably suffering and those who are not, ignores that doctors make crucial, life and death decisions based on these types of diagnoses every day. The Court in *Cruzan* indicated that the state's interest in the preservation of human life was subject to the more important Fourteenth Amendment rights of the individual. *Cruzan,* 497 U.S. 261.

"It is also clear that the proposition recognized by *Cruzan* is one of general applicability and not limited to the terminally ill. *Cruzan,* 497 U.S. at 278. Indeed, Nancy Cruzan was not terminally ill, and as the court noted medical experts testified that she could live another thirty years.'" *Id.* at 266 n. 1. Thus, this Court could not have resolved the case as it did by finding a liberty interest only in the terminally ill. *Compassion in Dying,* 79 F.3d at 863 n. 69.

The distinctions drawn between the rights of suffering people on life support and those who do not need life support amount to distinctions without a difference. In the words of Dr. Quill: "it seems unfair to base freedom of choice on arbitrary elements of a condition which determine whether a person is on life sustaining treatment or not." *Quill v. Vacco,* 80 F.3d at 732.

**C. An injunction which prohibits a citizen from "offering" or "conducting any acts to help a patient commit suicide regardless of the modality employed" is overbroad, vague and amounts to a constitutionally repugnant prior restraint of free speech.**

Even a legitimate goal (Petitioner contends that this injunction does not have one) "can not be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479 (1960). The state could protect life and innocent third parties through regulation of physician assisted suicide.[5] As

for protecting the integrity of the medical profession, would not that goal be better accomplished by physicians assisting patients who may desperately need their help to avoid unbearable pain and undignified death? This injunction is not "narrowly tailored" to the State's interest, it is an example of broad government censorship. It amounts to a ban on Dr. Kevorkian's even talking about suicide, from disseminating information and advocating positions on matters of public concern. This injunction is offensive to a Constitution which seeks to insure the free exchange of ideas.

The injunction against "offering" and "any acts" amounts to a complete ban on future expression of Dr. Kevorkian's ideas, and is not justifiable under any of the exceptions enunciated by this Court.[6] See, *Near v. Minnesota*, 283 U.S. 697 (1931). The injunction prohibits actions of the Petitioner that would clearly be constitutionally protected for all other citizens and is exactly the type of abuse of authority the constitutional barrier was erected against.[7]

The language of the injunction is so broad and sweeping that it prohibits Dr. Kevorkian from providing communications to anyone who might seek assistance in the ending of life. Subsequent to said injunction, Dr. Kevorkian published a book entitled *Prescription: Medicine, The Goodness of Panned Death* (Prometheus Books, 1991). The language contained in the injunction is so sweeping that it makes the publication of such a book impermissible.

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[5]"The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements." *Cruzan*, 497 U.S. at 281

Any form of prior restraint is heavily suspect and only justified in instance of threats to national security, obscenity, incitements to governmental overthrow or other violence, or interference with private interests.

Dr. Kevorkian has appeared on television and radio since the issuance of the injunction, advocating the right of citizens inflicted with incurable or terminal diseases to end their suffering by committing suicide, if need be. The language of the injunction is so sweeping that such appearances by Dr. Kevorkian are impermissible because statements by Dr. Kevorkian may help a patient commit suicide. The decretal paragraph of the order states as follows:

> IT IS HEREBY ORDERED that for the reasons set forth in this Court's Opinion of February 5, 1991, Defendant Dr. Jack Kevorkian, his agents and employees, and those in active concert or participation with him, shall be and hereby are permanently en joined from: using, employing, administering, **offering**, or providing any of his suicide machines' or other similar devices, contrivances or other modalities or drugs (including non-prescription drugs) on, or to, any persons seeking to end a human life, or conducting **any acts to help a patient commit suicide regardless of the modality employed.** (Emphasis supplied).

This Court has been assiduous in recognizing and

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[7]*See,* Derek Humphrey, Final Exit: The Practicalities of Self-Deliverance and Assisted Suicide for the Dying. (Dell Publishing Co.) 1992

*See also,* This Court may recall a story of a few years ago where a student, through researching documents within the public domain, compiled blueprints for the construction of a homemade nuclear device. The blueprints were eventually published in a journal. Even though the publication of such plans posed a potentially cataclysmic threat to the general public, the publication was sheltered by the Freedom of the Press and the Freedom of Speech. Progressive Magazine 1979.

protecting the rights of citizens under the First Amendment to engage in free expression of ideas, even if those ideas were considered repugnant. More than half a century ago, in *Near, supra,* this Court held that except under the most unusual of circumstances, such as when, in wartime, the government seeks to prevent the publication of sailing dates of troop ships or the location of troops, the state may not interfere, in advance, with freedom of expression and publication of information. In *Cantwell v Connecticut,* 310 U.S. 296 (1940), this Court found that the liberty of free expression was important to the fabric of American life. This Court has continually found that prior restraint for publication of ideas and information is constitutionally impermissible except under the most rare of circumstances which do not apply herein. *See, Nebraska Press Asso. v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States,* 403 U.S. 713 (1971).

The injunction imposed by the Oakland County Circuit Court flies in the face of this Court's holdings and constitutes an overt impermissible breach of Appellant's First Amendment rights. For it prohibits him from "offering" or conducting "any acts to help a person commit suicide regardless of the modality employed." The injunction does not limit the acts which could include verbal acts as well as physical acts. Moreover, "offering" can only constitute speech. Thus, the very breadth of the order prohibits Dr. Kevorkian alone from engaging in any communicative acts from which a person might gain some knowledge to commit suicide. As such, he is enjoined even from stating the obvious, to wit: that shooting oneself in the head is an effective way to commit suicide. Dr. Kevorkian should not be the only citizen so treated.

If Dr. Kevorkian can be prohibited from communicating with other persons regarding options of which they may wish to avail themselves to relieve interminable pain and suffering simply because his methods do not comport with the beliefs of a judge or even with the a large portion of the Establishment, who can ever be safe in espousing controversial ideas or

information? It is not that communication which is acceptable to government which needs protection. By definition, governmentally acceptable speech has the blessing of government and is not likely to be suppressed. Rather, it is speech which may be viewed as unconventional, "politically incorrect" or even obnoxious which needs and is entitled to protection.

The injunction must be struck down as being patently offensive to the Constitution of the United States. Surely, we have not come to the point where this Court will ever sanction a prior restraint upon any citizen for offering an act of kindness.

## II. The Michigan Court of Appeals Decision conflicts with other courts that have considered the issue, including the Court of Appeals for the Second and Ninth Circuits.

A conflict between decisions of a highest state court and a federal court of appeals on a question of federal law is ground for granting review of either decision. *See, Katziger v. Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947); *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947).

The Ninth Circuit, sitting en banc, held that mentally competent, terminally ill adults have a "constitutionally-protected liberty interest in determining the time and manner of [their] death," and that this right necessarily entails access to medical assistance in the form of obtaining a prescription for drugs that can be self administered to assure a certain, humane and dignified death. *Compassion in Dying v. Washington*, 79 F.2d at 793.[8] In balancing the state's interest against the individual's, the court concluded "unhesitatingly" that the balance favors the individual's liberty interest. *Id.*, at 814.

The Second Circuit Court of Appeals held two New York statutes unconstitutional which penalized assistance in suicide to the extent that the statutes prohibit physicians from acceding to requests of terminally ill, mentally competent patients for drugs to hasten death. *Quill v. Vacco*, 80 F.3d 716. The court

criticized the disparate treatment now afforded to those patients on life support who wish to end their life, and those not on life support who also wish to end their life, and proclaimed that this distinction did not rationally further any legitimate state purpose. *Quill,* 80 F.3d 716.

The injunction issued against Dr. Kevorkian is directly contrary to these two decisions proclaiming physician assisted suicide a constitutionally protected activity. Therefore, this Court should grant the petition for certiorari to determine which of these holdings applies the correct constitutional analysis.

**III. The Question Herein is Important.**

The question involved herein is an important one, not only to the Petitioner, but to the country as a whole. With new and insidious diseases, such as AIDS, wreaking havoc on thousands of our citizens, and with persons living longer and becoming subject to diseases which were known primarily in textbooks, if at all, the citizens of this nation are faced with increasingly serious questions regarding their own destinies.

There are those who may wish to live to the last breath, irrespective of the agony and torture which the cruelties of

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[8]Right to die cases have not been limited to terminal patients. In Washtenaw County Michigan, [In re Blodgett (83-26514-AZ)] a non terminal quadriplegic, who was even able to operate a motorized wheel chair, was allowed to be removed from his portable ventilator because his quality of life was unbearable. That was also the result in *Bartling v. Superior Court, et al.,* 163 Cal. App. 3d 186 (1984).

The New York Court of Appeals allowed a respirator to be removed from a patient after his guardian proved that prior to becoming incompetent, the patient had consistently expressed his view that life should not be prolonged if there was no hope of recovery. *In re Eichner,* 52 N.Y. 2d 363, cert. denied, 454 U.S. 858 (1981)

disease may consign them to suffer. Yet, there are others who may wish not to be victimized in all the horrible manner which some of the most notorious diseases visit upon their casualties. Should an adult, competent individual be forced by the State to endure the torture and suffering of unspeakable diseases against his or her will? May government, under the rubric of "protecting life", subject an unwilling participant to that type of torture which this Court would prohibit being inflicted upon a convicted murderer as being cruel and unusual punishment in violation of the Eighth Amendment?

The position of the State herein is a radical extremist position—an absolute prohibition on a competent adult's ability to obtain assistance of any kind, under any circumstances, for any reason, to end physical suffering if the assistance is designed to help that person end his or her own life.

As this nation embarks upon the 21st Century, these questions need to be answered by the highest Court of this land so that the law may be applied fairly and uniformly and so that the victims of catastrophic and tortuous physical infirmity may know that they need not be victimized twice—once by disease and a second time by their own government.

The opening paragraph of the Ninth Cicuit limited *en banc* panel opinion correctly notes: "This case raises an extraordinarily important and difficult issue . . . It requires us to confront the most basic of human concerns — the mortality of self and loved ones — and to balance the interest in preserving human life agains the desire to die peacefully and with dignity." *Compassion in Dying,* 79 F3d at 793. The court further recognized that this is a "controversy that may touch more people more profoundly than any other issue the courts will face in the foreseeable future." *Id.,* at 794.

## CONCLUSION

It is respectfully requested that this Honorable Court grant this Petition for Certiorari and set this case for full briefing, oral argument and decision.

Dated: July 22, 1996

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Supreme Court, U.S.
FILED

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No. _____

*In The*
*Supreme Court of the United States*
*October Term 1996*

JACK KEVORKIAN,
*Petitioner,*

v

STATE OF MICHIGAN,
*Respondent.*

Appendix to a Writ of Certiorari to
the Michigan Supreme Court

# PETITION FOR WRIT OF CERTIORARI

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No. _____

**In The**
**Supreme Court of the United States**

October Term, 1996

JACK KEVORKIAN, Petitioner,

v.

MICHIGAN, Respondent.

**Appendix to Petition for Writ of Certiorari to the Michigan Supreme Court**

## APPENDIX A

## ORDER OF PERMANENT INJUNCTION

(Circuit Court for the County of Oakland)
(February 5, 1991)

PEOPLE OF THE STATE OF MICHIGAN ex rel OAKLAND COUNTY PROSECUTING ATTORNEY, plaintiff v. JACK KEVORKIAN, defendant. No. 90-390963.

At session of said Court, held in the Courthouse, in the City of Pontiac, County of Oakland, State of Michigan, on February 5, 1991.

PRESENT: HONORABLE ALICE L. GILBERT, Circuit Judge.

This matter having come before the Court on Plaintiff's Complaint for injunctive relief and the Court being fully advised in the premise:

IT IS HEREBY ORDERED that for the reasons set forth in the Court's Opinion of February 5, 1991, Defendant Dr. Jack Kevorkian, his agents, and employees, and those in active convert or participation with him, shall be and hereby are permanently enjoined from: using, employing, administering, offering, or providing any of his "suicide machines", or other similar devices, contrivances, or other modalities or drugs (including nonpresciption drugs) on, or to, any persons seeking to end a human life, or conducting any acts to help a patient commit suicide regardless of the modality employed.

## APPENDIX B

## ORDER

(State of Michigan - Supreme Court)
(April 26, 1996)

PEOPLE OF THE STATE OF MICHIGAN ex rel OAKLAND COUNTY PROSECUTING ATTORNEY, plaintiff-appellee v. JACK KEVORKIAN, defendant-appellant. SC: 103577, COA: 138155, LC: 90-390963-AZ.

On order of the Court, the delayed application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Levin and Cavanagh, JJ., would grant leave to appeal.

## APPENDIX C

## OPINION

(State of Michigan - Court of Appeals)
( May 12, 1995)

PEOPLE OF THE STATE OF MICHIGAN ex rel OAKLAND COUNTY PROSECUTING ATTORNEY, plaintiff-appellee v. JACK KEVORKIAN, defendant-appellant, and HEMLOCK OF MICHIGAN, Amicus Curiae. No. 138155, LC No. 90-390963-AZ.

Before: Murphy, P.J., and Michael J. Kelly and Seed, JJ.

MURPHY, P.J.

The issue before this Court is whether the trial court erred by permanently enjoining defendant from using or providing "any of his 'suicide machines', or other similar devices, contrivances, or other modalities or drugs (including nonprescription drugs) on, or to, any persons seeking to end a human life, or conducting any acts to help a patient commit suicide regardless of the modality employed." We hold that no error occurred and accordingly affirm the trial court.

On June 4, 1990, defendant helped Janet Adkins commit suicide. On June 6, 1990, plaintiff filed a complaint for injunctive relief and a motion for a temporary restraining order. The temporary restraining order was not granted, but the trial court did issue an order to show cause why a preliminary injunction should not issue. At the conclusion of a hearing on June 8, 1990, at which defendants testified, the trial court issued a preliminary injunction temporarily enjoining defendant from using or providing his suicide machines or other devices or drugs in order to help a person seeking to end a human life.

Trial was held on plaintiff's request for injunctive relief

in January, 1991. Although defendant did not testify at trial, his testimony from the June 8, 1990, hearing was admitted as an exhibit. In addition, a statement prepared by defendant was admitted as an exhibit. Numerous other witnesses also testified.

Defendant admitted that he helped Ms. Adkins commit suicide by means of his "suicide machine," which consists of a frame holding three chemical solutions fed into a common intravenous line controlled by a switch and a timer. Defendant admitted that he inserted the intravenous line needle into Ms. Adkins' arm, but testified that Ms. Adkins activated the switch that turned on the machine and that Ms. Adkins wished to die because she had Alzheimer's disease and feared for the future. He testified that he discussed the matter with Ms. Adkins and her husband. However, he also admitted that he had no clinical training in Alzheimer's disease and was unaware of the progress of the disease in Ms. Adkins or whether modes of treatment were available. He testified that he is certified in anatomic and clinical pathology, that he has been unemployed in medicine since 1982 and living off savings, in part because his actions and theories have always been controversial, and that he has no special training in Alzheimer's disease, geriatric diseases or neurology. He admitted that he would offer the use of his machine in the future in the absence of an injunction preventing him from doing so.

On February 5, 1991, the trial court issued an opinion and order permanently enjoining defendant from using his machine or otherwise assisting in suicide. The court found as fact that defendant's actions in this case occurred as part of a physician-patient relationship, and that his actions must therefore be judged under currently operative standards of medical practice, and not standards which might ensue in the future. The court found that defendant is by education and training a retired pathologist without any experience or knowledge in the fields of internal medicine, geriatric medicine,

psychiatry, neurology, or other areas which might be helpful in diagnosing and managing Alzheimer's disease. The court found that defendant was not professionally qualified to evaluate the physical or emotional status of Ms. Adkins. Moreover, the court found that defendant made no attempt to take a comprehensive medical history, conduct a physical examination, order any tests, assess Ms. Adkins' medical status, or consult with experts. The court found that Ms. Adkins who was 54 years old, was neither imminently terminally ill, nor suffering from pain. After reviewing the videotape interview conducted by defendant with Ms. Adkins and her husband, the court found that she was coherent, responsive to verbal communication, and without any obvious physical or mental impairment. The court noted reports that she had played tennis within days of her death. Likewise, the video tape demonstrated that defendant made no real effort to discover whether Ms. Adkins wished to end her life, relying largely on the statements of her husband and a few limited responses from Ms. Adkins. The court found that defendant appeared to be in a hurry during the videotaped interview. The court found that Alzheimer's disease was not within the province of defendant's speciality, and that his actions did not conform to accepted medical standards. In particular, the court noted in its opinion that defendant had threatened to use his machine again in the future in the absence of an injunction presenting him from doing so.

On appeal, defendant does not challenge any of the trial court's findings of fact. Instead, defendant raises two questions of law.

First, defendant claims that the trial court erred in denying its motion for summary disposition based upon the doctrine of collateral estoppel and res judicata after a district court judge ruled in a related criminal case that assisting suicide is not a crime under the laws of the State of Michigan.

In People v. Hayden, 205 Mich. App. 412, 414-415; 522

NW2d 336 (1994), this Court recently reiterated the rule that dismissal of a prosecution at preliminary examination raises no bar under res judicata or collateral estoppel to a subsequent civil action involving the same facts. Moreover, it is now clear that the district court's dismissal of the criminal charge against defendant was erroneous. People v. Kevorkian, 447 Mich 436; 527 NW2d 714 (1994), cert den sub nom Hobbins v. Kelly, __ U.S. __ (1995). For these reasons, we find no merit to defendant's argument.

Defendant also claims that the trial court lacked jurisdiction to enjoin Dr. Kevorkian from committing a legal act. As indicated above it is now clear that Dr. Kevorkian's claimed legal act was in fact illegal. Kevorkian, supra. Alternatively, defendant argues that even if the actions of defendant were criminal, injunctive relief should not be available in this case. We disagree.

Courts of equity will generally not interfere to prevent the breach of a penal statute except to prevent the continuance of a nuisance affecting health, moral, or safety or to protect a public property right or interest. See Portage Twp. v. Full Salvation Union, 318 Mich 693, 706; 29 NW2d 297 (1947); Muckegon Bldg. & Construction Trades v. Muskegon Area Intermediate Sch. Dist., 130 Mich. App. 420, 429; 343 NW2d 579 (1983). See also 42 Am Jur 2d, Injunctions, § 157, pp 916-918. On the other hand, the mere fact that an act sought to be enjoined is punishable under the criminal law will not preclude either the state or an individual from invoking the jurisdiction of equity whenever other facts afford a basis for the exercise of equitable jurisdiction. Where equity would otherwise have jurisdiction, the fact that the Legislature has made such conduct a crime does not oust jurisdiction to enjoin. "Criminality neither affords a basis for, nor does it oust the jurisdiction of, the court to grant an injunction." 42 Am Jur 2d, Injunctions, § 157, p 918. See Garfield Twp v. Young, 340 Mich 616; 66 NW2d 85

(1954); Dearborn Nat'l Ins Co v. Comm'r of Ins, 329 Mich 107; 44 NW2d 892 (1950); Board of Health of Grand Rapids v. Vink, 184 Mich 688; 151 NW 672 (1915); United States v. US Klans Knights of Ku Klux Klan, Inc, 194 F Supp 897 (MD Ala, 1961); State ex rel Turner v. United Buckingham Freight Lines, Inc, 211 NW2d 288 (Iowa, 1973); Chicago v. Larson, 176 NE2d 675 (Ill. App., 1961).

In Attorney General v. Peterson, 381 Mich 445, 465-66; 164 NW2d 43 (1969), the Supreme Court held:

> We believe the better rule and the trend of modern authority is that equity may enjoin the unlicensed practice of a profession. At common law, acts in violation of law constitute a public nuisance. Harm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare. The attorney general, action on behalf of the people, is a proper party to bring an action to abate a public nuisance or restrain unlawful acts which constitute a public nuisance. The existence of a criminal or other penalty for the practice of a profession without a license will not oust equity from jurisdiction.

We hold that the trial court did not err in exercising equity jurisdiction in this case. Defendant's conduct before injunction entered and his threatened conduct in the future supports plaintiff's claim that recourse to the criminal courts alone may not be adequate to restrain unlawful acts or threats thereof which constitute, at a minimum, a public nuisance which affects health, moral, or safety. Defendant stated under oath that he would continue to aid in suicides even if his license was revoked. Defendant's actions implicate criminal law and his words and actions amount to an advertisement for criminal and unethical conduct. Defendant has made clear that he stands ready to assist people in ending their lives. Defendant has make clear that neither the actions of the Legislature, the executive, not the judiciary will sway him from his course. We will see.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly

Saad, J. (concurring).

I concur in the result of the majority opinion and write separately to express my view on this important topic.

I

Nature of the Case

We deal here with the important legal question of whether the trial court should have enjoined Dr. Kevorkian from helping others to kill themselves. Because respect for life and for the rule of law goes to the heart of our nation's traditions and the principles we live by, I believe that we must prohibit any person from placing himself above the law by helping people kill themselves. And, although the judiciary will ordinarily refrain from enjoining criminal misconduct because to do so would appear superfluous, courts must act when someone threatens to violate the rule of law by helping others to kill themselves. The courts must and should act to preserve the sanctity of life and to protect life and preserve the rule of and respect for the law.

II

Facts

I concur in the majority's recitation of the facts; however, I believe that the following facts deserve emphasis.

Significantly, in response to the unlawful conduct at issue, the Legislature passed a bill outlawing assisted suicide, 1993 PA 3, and the Governor signed the bill into law that same day. MCL 752.1027; MSA 28.547(127). The Michigan Supreme Court has since both upheld the statute against various

constitutional challenges, and reaffirmed that one who assists another to take his life violates he criminal laws of this state. People v. Kevorkian, 447 Mich 436; 527 NW2d 714 (1994). Most recently, all the parties have filed petitions for certiorari with the United States Supreme Court, which have been denied, sub nom Hobbins v. Kelly, __US__ (1995). It is against this backdrop of legal developments which reaffirmed the illegality of assisted suicide that we now affirm the decision of the trail court.

III

Issue

Should a court of general jurisdiction use its extraordinary injunctive powers to prohibit someone from helping another to kill himself where such conduct is both threatened and criminal?

IV

Analysis

Though rare, courts have used injunctions against repeated and threatened criminal conduct. 42 Am Jur 2d, Injunctions, § 157, p 917; State ex rel Turner v. United Buckingham Freight Lines, Inc, 211 NW2d 288 (Iowa, 1973); Chicago v. Larson, 176 NE2d 675 (Ill. App., 1961); United States v. US Klans Knights of Ku Klux Klan, Inc, 194 F Supp 897 (MD Ala, 1961); Garfield Twp v. Young, 340 Mich 616; 66 NW2d 85 (1954).

But why do so here? Because the sanctity of human life and the rule of law are, at one and the same time, the most cherished and vulnerable principles of our society and both are directly challenged and would be undermined by the threatened conduct if left unchecked.

On the other hand, compassion for those dying painfully and the concept of individual choice convince some citizens to support euthanasia. Combine these powerful forces with a

climate of situational ethics in a world where matters of life and death have become more decisional than natural and euthanasia to some becomes a moral imperative. However, the people of Michigan, through the Legislature, Governor and Supreme Court, have stated unambiguously that helping another to kill himself is criminal. Therefore, the issue raised by threatened violations of our laws against assisted suicide is: What is the proper response of the courts?

And, it is the answer to this question which mandates that we uphold the trial court's injunction against Dr. Kevorkian helping others to kill themselves.

The Judiciary cannot avoid its responsibility to address questions of life and death. Quill v. Koppel, 870 F. Supp 78 (SD NY, 1994); Compassion in Dying v. Washington, 49 F3d 586 (CA 9, 1995). Like it or not, these fundamental issues end up before judges who admittedly are more comfortable with and able to answer evidentiary rather than mortality issues. Yet, when faced with threatened violations of life and law, courts cannot remain adiaphorous, particularly where, as here, defendant's conduct strikes at the very heart of both. Quill, supra; Compassion in Dying, supra.

Indeed, it is the concomitant centrality and fragility of the principles of sanctity of life and respect for the law, combined with the frequency and ferocity of attacks on these principles that oblige this Court to place its equity powers squarely on the side of life and law. And this is especially true where, as here, both of these cherished traditions are threatened with one seductively insidious act. So, we affirm the trial court's order to Dr. Kevorkian to obey the law.

/s/ Henry William Saad

Judge Noonan recognized the paramount importance of the principles of the sanctity of life and respect for the law in Compassion in Dying, supra:

In the two hundred and five years of our existence no constitutional right to aid in killing oneself has ever been asserted and upheld by a court of final jurisdiction. Unless the federal judiciary is to be a floating constitutional convention, a federal court should not invent a constitutional right unknown to the past and antithetical to the defense of human life that has been a chief responsibility of our constitutional government.

## APPENDIX D

## OPINION

(State of Michigan - Circuit Court of Oakland County)
(February 5, 1991)

THE PEOPLE OF THE STATE OF MICHIGAN ex rel RICHARD THOMPSON, PROSECUTING ATTORNEY IN AND FOR THE COUNTY OF OAKLAND, plaintiff, v. JACK KEVORKIAN, defendant. 90-390963-AZ.

This matter is before the Court on the complaint for injunctive relief of Richard Thompson, Oakland County Prosecuting Attorney, on the relation of the People of the State of Michigan. The People seek to enjoin Defendant Jack Kevorkian, M.D., from implementing any device to assist people who wish to commit suicide. On June 8, 1990, after conducting a hearing, this Court issued a preliminary injunction providing that:

> . . . Defendant Kevorkian, his agents, and employees, and those in active concert or participation with him, shall be and hereby are enjoined pending final disposition of this cause from: using, employing, administering, offering, or providing any of his "suicide machines", or other similar devices, contrivances, or other modalities or drugs (including nonprescription drugs) on, or to, any person seeking to end a human life, or conducting any acts to help a patient commit suicide regardless of the modality employed.

TRIAL

A trial was held on January 4, 7 and 8, 1991. The Court heard testimony from 14 witnesses and examined 15 exhibits. Dr. Kevorkian did not take the stand at trial but his testimony from the June hearing was admitted as an exhibit.

This matter originated on June 4, 1990 when Dr. Kevorkian used a device that he designed and built (a "suicide machine") to assist Janet Adkins, a 54-year-old Oregon woman with Alzheimer's disease, in committing suicide. The suicide machine consisted of a frame holding three chemical solutions that fed into a common intravenous line which was controlled by a switch and a timer. Dr. Kevorkian has admitted that he inserted the intravenous line needle into Mrs. Adkin's arm. Dr. Kevorkian has also stated that Mrs. Adkins herself activated the switch that actually turned in the machine; however, he shook the bottles containing the chemical solutions to ensure that the flow was correct.

Dr. Kevorkian asserts that Mrs. Adkins wished to die because she had Alzheimer's disease and feared an uncertain future. He conducted a videotaped session with Mrs. Adkins and her husband discussing her decision to end her life. He agreed to assist Mrs. Adkins after a single encounter, a dinner conversation, without the benefit of taking a history, conducting and making an independent diagnosis and contrary to the advice of her primary care physician.

Dr. Kevorkian has stated that he is certified in anatomic and clinical pathology, that he has been unemployed in medicine since 1982, and that he had no special training in Alzheimer's disease, geriatric diseases or neurology. Dr. Kevorkian admitted that the use of his suicide machine is not a medically accepted and recognized procedure. Dr. Kevorkian also admitted that in the absence of an injunction preventing him, he would build another device and offer his suicide-assisting service. Moreover, if his medical license were revoked, he would build another device and use another system, but not as a doctor.

In a written statement to this Court filed August 17, 1990, in support of his self-termed crusade for death control, Dr. Kevorkian states that he wished to continue and expand the practice of a "rational policy of planned death." He contends

that "almost 50 suffering patients have pleaded with (him) to help end their suffering. . ." (Statement of Dr. Kevorkian dated August 17, 1990, p.3). Further, he states, the decision of the "need"for planned death is the sole responsibility of medical doctors. Dr. Kevorkian explains that his policy will apply solely to patients afflicted with obvious physical diseases in obvious physical distress. He then states, however: "In such cases, medical expertise or specialization becomes irrelevant. Even laymen could readily make the evaluation, and on first contact with the patient." (Statement, p.4). Dr. Kevorkian asserts that his role would be to confirm the diagnosis of a patient's personal physician and consultant specialist. He contends that his role is to "supply the means and medical supervision for patients to kill themselves." Moreover, he states, "[d]octor-assisted suicide is a one-on-one affair between doctor and suffering patient . . . (and) . . . The voluntary self-elimination of individual and mortally diseased or crippled lives taken collectively can only enhance the preservation of public health and welfare." (Emphasis in the original) (Statement, p. 11).

Physician-assisted suicide is not medically accepted practice, according to the testimony of the physicians and ethicists at the trial in this matter.

Dr. Leon Kass testified that the ethics of the medical profession prohibit activities which constitute participation in the death of a patient; the goal of medicine is to relieve suffering and there is no living beneficiary to receive the benefits of medicine in an assisted suicide. Dr. Kass also stated that Dr. Kevorkian's actions relative to Mrs. Adkins were not medically acceptable because the goal of causing death is beyond the goals of accepted medical practice in the United States. Dr. Kass noted the circumstances of Mrs. Adkin's death, namely, Dr. Kevorkian's subjective interest in the procedure, the vehicle, the location, and the nature of the interaction between doctor and suicide would threaten the existence of the medical profession

in the following ways: 1) There would be a threat to the trust reposed in the profession that the physician always acts in the best interest of the patient; 2) A physician would not be free to determine the best interest of the patient in view of the inherent danger in a subjective pronouncement that a life is unworthy of living; 3) There would be a question as to the voluntary and informed nature of a patient's consent; and 4) There can be no objective criteria for the self-determination to end a life.

Dr. Nancy Dickey testified that the American Medical Association has issued standards of ethical medical behavior which have been adopted by the Michigan State Medical Society. The AMA opposes the participation of a physician, voluntarily or involuntarily, in the termination of a patient's life by the administration of any agent or the use of any means to actively terminate a patient's life.

Dr. Arthur Caplan testified that Dr. Kevorkian's actions regarding Mrs. Adkins were not ethical because of: 1) The conflict of interest involved since Dr. Kevorkian designed, promoted and advertised the suicide machine; 2) Dr. Kevorkian's active role in implementing the device, e.g., purchasing the drugs, attaching the device to Mrs. Adkins and maneuvering the flow of the drugs; 3) Dr. Kevorkian's relationship with Mrs. Adkins (or lack thereof) vis-a-vis his determination as to her "informed" and "competent"consent; 4) The lack of imminently terminal condition; 5) Mrs. Adkin's apparent belief that her only choice was the suicide machine.

Dr. Caplan stated that he based his opinion on ethicality standards determined by the body of opinion of medical organizations, medical ethics literature, and legal tradition. He asserted that the consensus in the medical profession is to reject the moral acceptability of physician-assisted suicide. The practice of physician-assisted suicide threatens the people's trust in the integrity of the medical profession and invited the fear of abuse by physicians since there are no standards to determine

whether to end a life. Dr. Caplan asserted that physicians "do not have any special understanding in society to mediate death."

Amber Wells of the Michigan Department of Licensing and Regulation testified as to a letter received by the Department on January 24, 1990 from Dr. Kevorkian, which detailed his plan for assisted suicide. The letter (People's Exhibit 13) stated in part:

> My purpose is to inform the Department that I have begun a unique medical practice: to assist the rational suicide of patients who are suffering from imminently terminal illness, severely crippling or painful disease or deformity or trauma, and who, on their own, have decided that the quality of life for them has degenerated to intolerable levels. Candidates for the service must be alert and mentally competent, and their underlying condition must be physical (not psychiatric). The service entails more than one consultation with the patient, their close family members, and their personal physicians. The latter supply me with case summaries, including their assessment of prognosis. The suicide is accomplished in a painless, fast, and dignified way by means of a device I invented last year. At the time and place of his or her choosing he patient activates the device by touching a switch which cuts off a slow intravenous drip of saline solution and starts infusion of thiopental sodium solution. A minute later the device will infuse a solution of potassium chloride to stop the heart. The procedure will be monitored with a running electrocardio-graph to document clinical death. In every instance the local medical examiner will have been given prior notice.

Ms. Wells interviewed Dr. Kevorkian on August 6, 1990. A recording of the interview was played during the trial. In the interview, Dr. Kevorkian stated that he is not qualified to practice medicine as a general practitioner and that he would have to take refresher courses.

Dr. Kevorkian stated that the criteria he would employ in deciding to assist a person to commit suicide, include: the

patient's prognosis as derived from speaking with the patient's physician, the therapy undertaken, the patient's alternatives to suicide, the patient's family's thoughts on the choice of suicide and the firmness of the patient's own decision. He also stated that he wanted to have at least three meetings with the patient, factor and family. However, it was not possible to have these meetings with Mrs. Adkins and her family because of the geographical distance involved.

Dr. Kevorkian also referred in the interview to his desire to assist in the future patients with a whole new syndrome" in which a person in the late twenties-thirties age group does not want to live anymore and has felt this way since a very early age.

As to the Adkins case, Dr. Kevorkian stated in the interview that Mr. Adkins contacted him regarding the procedure, and that he then received and reviewed Mrs. Adkin's medical records. Dr. Kevorkian never spoke with Mrs. Adkins by telephone; he contends that she was embarrassed and reluctant to speak on the telephone because of her disease, so Dr. Kevorkian spoke only with Mr. Adkins. The only patient record he made of Mrs. Adkins was the videotaped consultation.

As to the actual use of the suicide machine on Mrs. Adkins, he stated that he had never previously used any of the drugs. He researched reference books and pharmacology books to learn what to do. He also conferred with two anesthesiologists regarding "technique." He used a large dose of the drug for Mrs. Adkins because he was unsure if the effectiveness of the procedure. Dr. Kevorkian clearly was using Mrs. Adkins for a first-time experiment of his death device.

Dr. Kevorkian stated in the interview that he would never work with a patient who would change his/her mind during the procedure and that he would know such a person just talking to him/her. If there were any problems during the procedure, he stated that he might have to break the law and finish it himself. He has no back-up procedures other than

ensuring that the device is effective and that competent people are employed.

Dr. Kevorkian asserted that if his medical license were to be suspended or revoked because of his planned practice, he would act "only as a citizen" and could employ other means to assist people who wished to commit suicide.

He spoke of the positive effects of planned death on society: the relief of the patient's suffering, the removal of the physical and psychological burden from the patient's family, and the avoidance of wasted societal resources. He stated that if the preliminary injunction were lifted, he would use a device to aid other suicides.

Dr. Murray Raskind, who treated Mrs. Adkins in the early stages of her disease, testified at trial that she could have lived and additional seven to ten years and that he doubted that she was mentally competent to make the decision that led to her suicide. He also stated that he told Dr. Kevorkian that Mrs. Adkins was not suffering terminally ill patient and this was not a "suitable candidate" for physician-assisted suicide.

Dr. Linda Biedrzycki, a board certified pathologist licensed to practice medicine in Michigan, testified at trial that, as a pathologist, she is not qualified to practice in all areas of medicine including neurology, psychiatry or the diagnosis of Alzheimer's patients. Further, a pathologist would only treat living patients in a consultive capacity.

Dr. Jacob Chason testified as a neuropathologist who has acted as a consultant on Mrs. Adkin's autopsy. He stated that Mrs. Adkin's brain contained more Alzheimer's disease plaques and tangles than all but one other brain in the more than 20,000 he has examined. He determined that the Alzheimer's disease was highly advanced in Mrs. Adkins.

Sherry Miller testified on Dr. Kevorkian's behalf that she wished to use his suicide machine because of her progressive deterioration due to multiple sclerosis. She stated that she did

not want to burden anyone and stressed that she wants the right to die and the right to have the assistance of a doctor.

Virginia and Virgil Bernero testified as to Victor Bernero's painful death due to AIDS, and praised the efforts of Dr. Kevorkian. Both stated their belief in a person's right to die.

## FINDINGS

1.) Dr. Kevorkian acted as a physician with an established physician/patient relationship. As such, this Court's opinion must be guided by and reflect the currently approved standards of medical practice, and not those standards likely to ensue in the future. Physicians practice under codes of professional conduct that are established by the American Medical Association and adopted in the by-laws of all accredited hospitals in the United Stated. It is, therefore, reasonable to take the position that physicians have a moral, ethical and professional obligation to adhere to these codes in the delivery of health care to their patients.

2.) Dr. Kevorkian is, by education and training, a pathologist who has been retired from practice since 1982. He is totally divorced from any experience in the field of internal medicine, geriatric medicine, psychiatry and neurology, all areas that would play a definitive role in the diagnosis and management of the disease afflicting the patient, Mrs. Adkins. This Court finds that Dr. Kevorkian was not professionally qualified to evaluate the physical and/or emotional status of Mrs. Adkins, and that he did indeed, carry out what in his mind was a therapeutic measure, a form of treatment that far exceeded his professional knowledge and skills.

3.) Notwithstanding Dr. Kevorkian's limitations, he made no attempt to take a comprehensive medical history, conduct a physical examination, order any laboratory tests, assess the true neurological status or obtain consultation, all requisites of acceptable medical practice. Although Dr.

Kevorkian contended that his role would be to confirm the diagnosis of the patient's perso. al physician and consulting specialist, it was, in fact, the patient who, through brief conversation, stated the diagnosis and selected the modality of treatment. Convincing evidence was submitted, in the videotaped interview conducted by Dr. Kevorkian, that Mrs. Adkins, then 54 years of age, was neither imminently terminally ill not suffering from any pain. Rather, she was coherent, responsive to verbal communication, and without significant clinically obvious physical or mental impairments; it was reported that she played tennis within days of her induced death.

The evidence surrounding Mrs. Adkin's desires is too sparse for this Court to factually find that Mrs. Adkins wanted to commit suicide. Mr. Adkins did most of the talking for his wife on the videotape. Dr. Kevorkian failed to probe Mrs. Adkin's limited responses of "wanting to get out" and "self-deliverance." At no time on the tape did Mrs. Adkins tell Dr. Kevorkian that she wanted to commit suicide or end her life, or that she wanted Dr. Kevorkian to immediately put her to death. Dr. Kevorkian appeared to be in a hurry on the tape, and exhibited little knowledge in understanding and communicating with an Alzheimer's patient. He also displayed a lack of knowledge and ability to obtain an informed consent by failing to explain the need for the procedure, the alternatives available, the risk involved, the implications of the procedure, the result if the procedure was not done and the benefits the patient would have from the procedure. The testimony indicates that Janet Adkins was afflicted by progressive, irreversible neurologic disease of unknown etiology that had advanced to the level of producing a degree of mental incompetence, but not to the degree where it prevented a reasonably acceptable quality of life that could have endured several years into the future.

4.) The affliction from which Mrs. Adkins suffered has been under intense investigation by scientists throughout the

world. What cures or controls lie upon the horizon are today unknown, but remain a distinct possibility. By inducing her death under the existing circumstances, Dr. Kevorkian denied Mrs. Adkins not only the benefits of available therapy, but he also failed to comprehensively inform her of investigation being conducted, and thereby denied her the benefit of possible future therapy that may have led to more effective therapy.

5.) As a specialist in the field of pathology, Dr. Kevorkian was obligated to meet and must be held to the standards of a reasonable pathologist practicing medicine in light of the state of that specialty's scientific knowledge existing at the time of any alleged act. Testimony confirmed that the disease from which Janet Adkins was suffering was a clinical problem and not within the province of the practice of pathology. Dr. Kevorkian's actions relative to his treatment of Mrs. Adkins were not medically acceptable, and, therefore, violated acceptable standards of medical practice. Further testimony gave credence to the opinion that current standards of medical practice specifically prohibit any activities that constitute participation in the death of a patient.

6.) In an effort to substantiate his position, Dr. Kevorkian quotes the Hippocratic Oath which states in part: "That I will exercise my art solely for the cure of my patient, and I will give no drug, perform no operation for a criminal purpose, even if solicited, far less suggest it."

## ANALYSIS

The Question before this Court is relatively narrow: Whether this Court has the jurisdiction and should exercise that jurisdiction to permanently enjoin Defendant Dr. Kevorkian from employing any device to assist another person in committing suicide. The Court answers this question in the affirmative.

The Court first notes that it has jurisdiction over this

action pursuant to Const 1963, art. 6 sec. 13 which grants circuit courts jurisdiction over all matters not prohibited by law. Further, this Court is empowered to grant relief sought by the People by virtue of its broad grant of equitable powers as provided by MCL 600.601(2).

The Court finds that injunctive relief is appropriate in this matter. Injunctive relief is proper where a plaintiff has shown that the defendant's actions would cause plaintiff irreparable harm and that plaintiff has no adequate remedy at law. Treasurer of Committee to Elect Gerald D. Lostracco v. Fox, 150 Mich. App. 617 (1986). Although equity jurisdiction is generally not available to enjoin criminal violations, a court may exercise its equitable powers to abate public nuisances affecting health, morals, or safety, or to protect a public property right or interest. State ex rel Wayne Prosecuting Attorney v. Martin, 314 Mich 317 (1946), Township of Kalamazoo v. Lee, 228 Mich 117 (1924). "Harm to the public is presumed to flow from the violation of a valid statute enacted to preserve public health, safety and welfare." Attorney General ex rel Optometry Board of Examiners v. Peterson, 381 Mich. 445, 465 (1969).

Dr. Kevorkian's planned course of conduct implicates the criminal law, specifically, the provisions against homicide, MCL 750.316: Dr. Kevorkian has stated that he would "finish the job" if his device failed; this crosses any line that exists between assisting a suicide and committing a murder. Dr. Kevorkian's planned course of conduct also implicates the criminal provisions against the unlawful dispensing of controlled substances for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of the practitioner's practice. MCL 333.7401, MCL 333.7405, MCL 333.7406. The Court notes that MCL 333.7511 empowers the Court to enjoin a violation of the provisions against unlawful dispensing of controlled substances. The jurisdiction of the Court is not destroyed by the fact that a

criminal act will be restrained. Township of Garfield v. Young, 340 Mich 616, 619-620 (1954), Township pf Warren v. Raymond, 291 Mich 426, 428 (1939).

Dr. Kevorkian's planned course of conduct implicates the provisions of the Michigan Public Health Code. MCL 333.1101 et seq. The Public Health Code shall be liberally construed for the protection of the health, safety and welfare of the people, MCL 333.1111(2). Dr. Kevorkian's planned course of conduct relates to medical licensure law, Equity may enjoin the unlawful practice of a profession. The dispensing of drugs is an activity within the statutory definition of the practice of medicine. Attorney General v. Recorder's Court Judge, (People v. Bouee) 92 Mich App 42 (1979). MCL 333.16291 provides that a circuit court may enjoin a person from a violation of a statute or rule promulgated under the medical licensing statute, MCL 333. 17001 et seq. Dr. Kevorkian plans to take active steps to end the life of another person with drugs and/or a device. He admits accepting patients outside his specialty of pathology even in light of his admission that he is not qualified to practice as a general practitioner. Dr. Kevorkian's conduct must also be viewed in light of the research provisions of the Public Health Code, MCL 333.2601 et seq. Dr. Kevorkian's threatened actions conflict with the public's interest in protection and promotion of the health of individuals and the public as a whole. Finally, the Public Health Code is intended to be construed as consistent with applicable federal law, MCL 333.1111(1). The Court notes that the purpose of the Federal Food, Drug, and Cosmetic Act, 21 USCS 301 et seq, which provides for regulation of drugs and devices, is to protect public health.

Finally, Dr. Kevorkian's conduct implicates tort law. Youngberg v. Romeo, 457 US 307, 321, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).

A number of cases have addressed the right of an

individual to refuse medical intervention or treatment. The United States Supreme Court has held that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment. Washington v. Harper, __ U.S. __, 110 S.Ct. 1028, 108 L.Ed2d 178 (1990). However, the determination "that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry, 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interest against the relevant State interests against the relevant State interest.' (Citations omitted.)" Cruzan v. Director, Missouri Dept of Health, 497 U.S. __, 110 S.Ct. __, 111 L.Ed2d 224 (1990).

The State has a great interest in the protection and preservation of human life. The State demonstrates this commitment to life by treating homicide as serious crime. Id., p. 243. Although Dr. Kevorkian argues essentially that the "self-elimination of . . . mortally diseased or crippled lives taken collectively can only enhance the preservation of public health and welfare. . .", the State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual. Id, p. 244.

The State's interest in protecting innocent third parties arises in situations where a competent adult refuses life-saving or life-prolonging treatment; even in this type of situation, the State has a valid interest in the protection of an individual's minor children. "When the patient's exercise of his free choice could adversely and directly affect the health, safety, or security of others, the patient's right of self-determination must frequently give way." In the Matter if Conroy, 98 NJ 321; 486 A2d 1209, 1225 (1985).

The State has compelling interest in the prevention of suicide. Suicide is precisely the action that Dr. Kevorkian seeks

to protect. There is no constitutionally recognized right to commit suicide. In fact, the power of the State to prohibit suicide is unquestionable. Cruzan, supra, p. 255.

The final State interest which is implicated is the maintenance of the ethical integrity of the medical profession. There is substantial evidence on the record in this case as to the unacceptability of Dr. Kevorkian's proposed practice. Prevailing medical ethical practice rejects physician assisted suicide; the goal of causing death is contrary to the goal of medicine to promote health and life. Doctors testified as to the medical profession in view of the potential for error or abuse and the lack of capability of a precise measurement of pain and incurability, consent and voluntariness. The Court finds that the proposed practice of physician-assisted suicide is outside of the realm of acceptable medical practice and threatens the ethical integrity of the medical profession.

As to the asserted individual rights, Dr. Kevorkian seek to expand these rights of self-determination and privacy to include the right to assisted death. As noted by the Supreme Court in Cruzan, the liberty interest in refusing medical treatment flows from decisions involving the State's invasions into the body. Cruzan, p. 241. In the present case, however, there is not State-threatened invasion of the body. The procedure contemplated in this case is active consensual death, assisted by another person. The Court finds that the State's interest greatly outweigh an individual's interests in this situation, and notes a critical difference between the present situation and prior cases which have upheld the individual's rights of privacy and self-determination: The fact that Dr. Kevorkian is the party to this case and to the proposed procedure evidences that the asserted individual rights at stake are not the rights of privacy and self-determination. The terms "privacy" and "self-determination" belie the participation of another individual; yet this is precisely what Dr. Kevorkian proposes --

the right to assist a suicide. The rights of privacy and self-determination do not encompass the right to direct another person to kill, or the right of a third person to participate in the killing. Patients can not confer a right upon a doctor to assist a suicide. Patients can not dictate to a physician how to practice medicine.

Therefore, the Court concludes that Dr. Kevorkian should be permanently enjoined from employing any device to assist a person in committing suicide. The Court finds from the evidence submitted by Defendant, (his statement and the interview with the Department of Licensing and Regulation), and by the People, (medical and ethical opinion, Dr. Raskind's testimony) that Defendant should not be entrusted to make the judgment of another individual's worth or "self-determination" by his own nebulous, conflicting standards and procedures. In the present case, and under the present facts, the Court finds that the State interests far outweigh Dr. Kevorkian's desire to assist a person to commit suicide or any individual's interest in exhorting another person to assist in that individual's suicide.

## CONCLUSION

If we accept the premise that life is mankind's most precious asset, those charged with the responsibility for its maintenance are obliged to exercise prudent judgment and beneficent caution to ensure its preservation. This is not to infer that situations do not exist under which life exceeds the level of physical and/or emotional tolerance where, in fact, the alternative to life serves the best interest of a patient.

The opinion expressed in this case is not to be interpreted as having any impact upon the right-to-die issue as it related to the suffering of the terminally ill, patients in prolonged irreversible comas, and those afflicted with incurable disease accompanied by intractable pain and/or severe emotional anguish. There is reason to condone dying with dignity, but it

mandates a controlled environment that can be properly and professionally monitored by competent persons and in a manner that is acceptable to society. The need for the medical profession and the State legislature to deal realistically with this critical issue is society's challenge.

The circumstances relative to the treatment of Janet Adkins by Dr. Jack Kevorkian do not fall within the above-stated category. Rather, this concerns a physician who, under the scope of medical practice and with an established physician-patient relationship, actively participated in the intentional death of a patient. As a physician, Dr. Kevorkian was morally, ethically, professionally and legally obligated to adhere to the current standards of medical practice as approved by the medical profession, accepting, of course, the fact that these standards are not static and are subject to change.

Testimony at the hearing elicited several important considerations:

1. Dr. Kevorkian ism by education, a pathologist who has been retired from practice for a period of eight years. He is, and has been, totally divorced from any education or experience in the fields of internal medicine, geriatrics, psychiatry, neurology, and he has not had any practical experience with dealing with a patient on the clinical level. Expert testimony verified the fact that pathologists are not qualified to practice clinical medicine in the above-stated areas, and this Court finds that Dr. Kevorkian was not qualified to evaluate the physical or emotional status of the patient and that he engaged in an activity that far exceeded his professional competence.

2. Dr. Kevorkian's pre-treatment contact with the patient was limited to one appointment, and a videotaped session discussing her decision. There is no evidence that he ever took a medical history or conducted any type of physical or laboratory examinations that could lead to an independent diagnosis. He denied Janet Adkins the benefit of consultation, and a phone call

to the patient's primary care physician received the response that his contemplated procedure was ill-advised, and his testimony indicated that she could have lived seven to ten years with a reasonable quality of life. It was, in fact, the patient, perhaps fearing the consequence of the future, who dictated the treatment modality, and Dr. Kevorkian simply obliged.

3. The videotaped interview clearly demonstrated that Mrs. Adkins, then 54 years of age, was neither imminently terminally ill nor suffering pain. She was coherent and responsive to questions, and without significant evidence of physical or mental impairment. She had played tennis within days of her induced death. Testimony was provided to the effect that, notwithstanding her obvious well-being, it is probable that she did have sufficient mental impairment to preclude the capacity to make the decision she made. Mrs. Adkin's response were brief with comments such as she "wanted out" and wished to be "self-delivered." Dr. Kevorkian failed to thoroughly probe the several rather ambiguous expressions. She never specifically asked that Dr. Kevorkian should put her to death, or that she wanted to die immediately. Neither did he take the time to provide comprehensive information relative to the significance of her decision, possible alternatives like psychiatric and social counseling, and investigation that was being carried out throughout the world that could lead to the cure or control of the disease. In addition, he did not tell the patient that he had never before used the "machine", and its effectiveness was yet to be determined. The interview conveys the impression that Dr. Kevorkian was rather anxious to try his invention that he had advertised, and Janet Adkins appeared as a likely candidate.

4. Testimony by experts provided unequivocal evidence that Dr. Kevorkian's actions were contrary to current standards of medical practice, and that the standards issued by the American Medical Association, adopted by the Michigan Medical Society, specifically oppose the active participation of

a physician in assisting a patient in the process of ending life.

The multiple eccentric, unorthodox, and controversial remarks made by Dr. Kevorkian provide convincing evidence that he has a flare for flamboyancy, a propensity for media exposure, and seeks recognition through bizarre behavior. His arrogance coupled with unabashed disregard and disrespect for his profession and its current professional and ethical standards reveal that his real goal is self-service rather than patient service. The reasons why Dr. Kevorkian has been unable to find employment in any accredited hospital are made patently clear to the Court. If allowed to continue with his death-delivering device he could well become an onerous burden, rather than a benevolent boon, to society.

In summary, Dr. Kevorkian, as a physician practicing medicine, has the obligation to abide by the standards of care in the light of current knowledge and skills, including the codes of conduct, that have been prescribed and endorsed by the medical profession. Testimony provided before this Court has clearly demonstrated that he flagrantly violated these standards and codes.

Dr. Kevorkian envisions himself as a charitable maverick, destined to revolutionize the practice of medicine. His peers look upon him as a menace that threatens the existence of the medical profession and those creeds that have endured since the time of Hippocrates. This Court finds it difficult to believe that the physicians of he past 2000 years have been blind to need, and only Dr. Kevorkian has the vision to lead them out of the darkness. At the present time, patient self-determination does not encompass self-extermination effectuated by a physician. Patient can not confer a right upon a doctor to assist a suicide. Patients can not dictate to a physician how to practice medicine.

As science, technology and the art of medicine advance, changes may be in order. While this Court and the current law

are not adverse to planned death, any such action must be under the proper circumstances and conducted by persons of competence and integrity acting with convincing sincerity of purpose within a legal, moral and ethical framework.

The temporary injunction issued in this cause shall be made permanent.

IT IS SO ORDERED.

Alice L. Gilbert
Circuit Judge

February 5, 1991

## APPENDIX E

## RELEVANT PAGES FROM APPLICATION FOR LEAVE TO APPEAL

(Michigan Supreme Court)
(July 6, 1995)

**III. The Court of Appeals Erred in Upholding the Injunction Against Defendant When it Clearly Violated Defendant's First Amendment Right to Free Speech.**

The First Amendment to the Constitution of the United States expressly prohibit laws which would abridge the freedom of speech. The same fundamental principles contained in the First Amendment are protected from abridgment by any action by the State of Michigan by virtue of the due process clause of the Fourteenth Amendment. Book Tower Garage v. Local No. 415, Inter. Union, United Auto. Workers of America, 295 Mich 580, 295 N.W. 320 (1941). "State action" includes a judicial act such as an injunction. For example, the courts have held that the granting of injunctive relief against personal defamation would infringe the constitutionally guaranteed freedoms of speech and press by setting up what would be, at least potentially, a system of judicial censorship. Willis v. O'Connell, 231 F. Supp. 1004 (DC Ala); Konigsberg v. Time, Inc., 288 F. Supp. 989 (SD NY); Judson v. Surhost, 78 Ohio St. 2446, 85 NE 1127.

Freedom of speech is crucial to "assure the unfettered interchange of ideas for the cringing about of political and social changes desired by the people. It is only through free debate and free exchange of ideas that the government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets the

United States apart from totalitarian regimes." 16A Am Jur 2d Constitutional Law, pp.316-317. In the instant case, the trial court judge, and the Court of Appeals have attempted to deny Dr. Kevorkian his constitutionally protected right to free speech, and to exchange ideas to promote peaceful change. This issue was created by Circuit Court Judge Gilbert's injunction and opinion. Defendant/Appellant raised the issue in the Court of Appeals, but that court failed to address the issue.

The permanent injunction issued by Circuit Court Judge Alice Gilbert contains broad sweeping language that would interfere with Dr. Kevorkian's right to discuss suicide and the means to commit suicide with others. The permanent injunction specifically enjoins Dr. Kevorkian from "offering" any of his "suicide machines" or other assistance to anyone "seeking to end a human life" and from "conducting **any acts** to help a patient commit suicide regardless of the modality employed." This injunction prohibits Dr. Kevorkian from making statements that others may make without impunity regarding suicide. This is a clear violation of Dr. Kevorkian's First Amendment rights and for this reason alone the permanent injunction should be struck down by this Honorable Court.

This Court may recall a story of a few years ago where a student, through researching documents within the public domain, compiled blueprints for the construction of a homemade nuclear device. The blueprints were eventually published in a journal. Even though the publication of such plans posed a potentially cataclysmic threat to the general public, the publication was sheltered by the Freedom of the Press and the Freedom of Speech. Certainly, Dr. Kevorkian's device and his counseling individual patients presents a threat of no comparison to an atomic bomb. Defendant, too, should be sheltered by the Constitutional guarantees afforded to all citizens of the United States.

## APPENDIX F

## CONSTITUTIONAL PROVISIONS INVOLVED

**Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Amendment V**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; not shall private property be taken for public use, without just compensation.

**Amendment IX**

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

**Amendment XIV § 1**

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
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No. 96-135

In The

# Supreme Court of the United States

October Term, 1995

JACK KEVORKIAN,

*Petitioner,*

v.

STATE OF MICHIGAN ex rel OAKLAND COUNTY PROSECUTING ATTORNEY,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Appeals For The State Of Michigan**

## BRIEF OF RESPONDENT PROSECUTING ATTORNEY RICHARD THOMPSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

WHETHER THIS COURT SHOULD DECLINE TO GRANT CERTIORARI WHERE PETITIONER HAS FAILED TO RAISE IN THE LOWER STATE COURTS THE FEDERAL ISSUES UPON WHICH HE NOW SEEKS REVIEW?

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## ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

Petitioner Richard Thompson, Prosecuting Attorney in and for the County of Oakland, State of Michigan, by Richard H. Browne, Assistant Prosecuting Attorney, on behalf of the People of the State of Michigan, respectfully prays that this Honorable Court deny Petitioner's Petition for a writ of certiorari to review the opinion of the Michigan Court of Appeals entered on May 12, 1995 and reported as *People ex rel Oakland County Prosecuting Attorney* v *Kevorkian*, 210 Mich. App. 601; 534 N.W. 2d 172 (1995).

## CITATIONS TO OPINIONS BELOW

The opinion of the Michigan Court of Appeals is found at *People ex rel Oakland County Prosecuting Attorney* v *Kevorkian*, 210 Mich. App. 601; 534 N.W. 2d 172 (1995). The order of the Michigan Supreme Court denying Petitioner's application for leave to appeal is found at *People ex rel Oakland County Prosecuting Attorney* v *Kevorkian*, 451 Mich. 874; ___ N.W.2d ___ (1996).

## JURISDICTION

The decision of the Michigan Court of Appeals was entered May 12, 1995, and the order of the Michigan Supreme Court denying leave to appeal was filed on April 26, 1996. Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a). However, he seeks a writ of certiorari to the Michigan *Supreme* Court.

As shown by the order of the Michigan Supreme Court (reproduced in Petitioner's Appendix at A-2), Petitioner's application for leave to appeal was denied by that court "because [the Court is] not persuaded that the question presented should be reviewed by this Court." Discretionary review having been denied by the Michigan Supreme Court, Petitioner improperly seeks a writ of certiorari to that court rather than to the Michigan Court of Appeals as he should. *Interstate Circuit, Inc.* v *Dallas*, 390 U.S. 676, 678 n 1, 88 S. Ct. 1298, 20 L. Ed. 2d 225 (1968); *Brown* v *Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

## CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions which Petitioner claims this petition involves are:

Constitution of the United States, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. [Emphasis supplied.]

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy

> of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use without just compensation. [Emphasis supplied.]

Constitution of the United States, Amendment IX:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Constitution of the United States, Amendment XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner's Statement of the Case does not set forth when the issues now raised by Petitioner were presented in the lower courts. That omission arises from the fact that the issues were never presented below and thus were never ruled on by the lower courts. Petitioner has failed to present, as required by Rule 14.1(g)(i) the

> * * * specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions

> sought to be reviewed were raised; the method and manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific references to the places in the record where the matter appears (*e.g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. * * * .

The factual background of this case is adequately presented in the decision of the Michigan Court of Appeals, *Kevorkian, supra,* 210 Mich. App. at 603-606:

> On June 4, 1990, defendant helped Janet Adkins commit suicide. On June 6, 1990, the people filed a complaint for injunctive relief and a motion for temporary restraining order. The temporary restraining order was not granted, but the trial court did issue an order to show cause why a preliminary injunction should not be issued. At the conclusion of a hearing on June 8, 1990, at which defendant testified, the trial court issued a preliminary injunction temporarily enjoining defendant from using or providing his suicide machines or other devices or drugs in order to help a person seeking to end a human life.
>
> A trial was held regarding the people's request for injunctive relief in January 1991. Although defendant did not testify at trial, his testimony from the June 8, 1990, hearing was admitted as an exhibit. In addition, a statement

prepared by defendant was admitted as an exhibit. Numerous other witnesses also testified.

Defendant admitted that he helped Ms. Adkins commit suicide by means of his "suicide machine," which consists of a frame holding three chemical solutions fed into a common intravenous line controlled by a switch and a timer. Defendant admitted that he inserted the intravenous line needle into Ms. Adkins' arm, but testified that Ms. Adkins activated the switch that turned on the machine and that Ms. Adkins wished to die because she had Alzheimer's disease and feared for the future. He testified that he discussed the matter with Ms. Adkins and her husband. However, he also admitted that he had no clinical training in Alzheimer's disease and was unaware of the progress of the disease in Ms. Adkins or whether modes of treatment were available. He testified that he is certified in anatomic and clinical pathology, that he has been unemployed in medicine since 1982 and living off savings, in part because his actions and theories have been controversial, and that he has no special training in Alzheimer's disease, geriatric diseases, or neurology. He admitted that the use of his machine was not a medically accepted or recognized procedure. He also stated that he will use his machine in the future in the absence of an injunction preventing him from doing so.

On February 5, 1991, the trial court issued an opinion and order permanently enjoining defendant from using his machine or otherwise assisting in a suicide. The court found as fact that defendant's actions in this case occurred as part of a physician-patient relationship and that

his actions must therefore be judged under currently operative standards of medical practice, and not standards that might ensue in the future. The court found that defendant is by education and training a retired pathologist without any experience or any knowledge in the fields of internal medicine, geriatric medicine, psychiatry, neurology, or other areas that might be helpful in diagnosing and managing Alzheimer's disease. The court found that defendant was not professionally qualified to evaluate the physical or emotional status of Ms. Adkins. Moreover, the court found that defendant made no attempt to take a comprehensive medical history, conduct a physical examination, order any tests, assess Ms. Adkins' medical status, or consult with experts. The court found that Ms. Adkins, who was fifty-four years old, was neither imminently terminally ill nor suffering from pain. After reviewing the videotaped interview conducted by defendant with Ms. Adkins and her husband, the court found that she was coherent, responsive to verbal communication, and without any obvious physical or mental impairment. The court noted reports that she had played tennis within days of her death. Likewise, the videotape demonstrated that defendant made no real effort to discover whether Ms. Adkins wished to end her life, relying largely on the statements of her husband and a few limited responses from Ms. Adkins. The court found that defendant appeared to be in a hurry during the videotaped interview. The court found that Alzheimer's disease was not within the province of defendant's specialty and that his actions did not conform to accepted medical standards. In particular, the court noted

> in its opinion that defendant had threatened to use his machine again in the future in the absence of an injunction preventing him from doing so.
>
> On appeal, defendant does not challenge any of the trial court's findings of fact. Instead, defendant raises two questions of law.
>
> First, defendant claims that the trial court erred in denying his motion for summary disposition based upon the doctrines of collateral estoppel and res judicata after a district court ruled in a related criminal case against the defendant that assisting suicide is not a crime under the laws of the State of Michigan.
>
> * * *
>
> Defendant also claims that the trial court lacked jurisdiction to enjoin him from committing a legal act. As indicated above, it is now clear that defendant's claimed legal act was in fact illegal. [*People v*] *Kevorkian, supra* [447 Mich 436 (1994)]. Alternatively, defendant argues that even if his actions were criminal, injunctive relief should not be available in this case. We disagree.

As noted by the Michigan Court of Appeals, Petitioner raised the following issues in his appeal to the Michigan Court of Appeals:

> [I.] THE LOWER COURT ERRED BY DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION BASED ON THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA.

[II.] NATURE OF THE ACTIVITY: CRIMINAL, IMMORAL OR BREACH OF STANDARD OF CARE?

A. Aiding and Abetting suicide is not a crime under the laws of the State of Michigan and assisting suicide is a legal act which cannot be enjoined by a court of equity.

B. The issue of self-determination discloses a moral, ethical and religious debate to be responded to by the legislative will of the People, not the judiciary.

C. An act that is outside the definition of the practice of medicine does not violate the licensing statutes of the State of Michigan.

[III.] THE ISSUANCE OF AN INJUNCTION BARRING DR. KEVORKIAN FROM ASSISTING SUICIDE WAS OUTSIDE THE SCOPE OF THE COURT'S JURISDICTION AND CONSTITUTED AN ABUSE OF DISCRETION.

A. The exercise of police power is reserved to the legislative branch of government.

B. Injunctive relief is not a proper remedy when other remedies at law are available.

As noted above, the Court of Appeals rejected Petitioner's arguments and affirmed the judgment of the lower court. *People ex rel Oakland County Prosecuting*

*Attorney* v *Kevorkian*, 210 Mich. App. 601; 534 N.W.2d 172 (1995).

Following the decision of the Court of Appeals in this case, Petitioner sought delayed leave to appeal in the Michigan Supreme Court. Petitioner raised the following issues:

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE CIRCUIT COURT'S DENIAL OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION BASED ON THE DOCTRINES OF COLLATERAL ESTOPPEL AND RES JUDICATA AFTER DISTRICT COURT JUDGE MCNALLY HAD RULED THAT ASSISTING SUICIDE WAS NOT A CRIME UNDER THE LAWS OF THE STATE OF MICHIGAN.

II. THE COURT OF APPEALS ERRED IN UPHOLDING THE UNPRECEDENTED INJUNCTION AGAINST DEFENDANT EVEN IF ASSISTING SUICIDE LATER BECAME A "CRIME" PURSUANT TO 1993 PA 3; MCL 752.1027.

III. THE COURT OF APPEALS ERRED IN UPHOLDING THE INJUNCTION AGAINST DEFENDANT WHEN IT CLEARLY VIOLATED DEFENDANT'S FIRST AMENDMENT RIGHT TO FREE SPEECH.

On April 26, 1996, the Michigan Supreme Court denied Petitioner's application for leave to appeal, "because we are not persuaded that the question [sic] presented should be reviewed by this Court." *People ex rel*

*Oakland County Prosecuting Attorney* v *Kevorkian*, 451 Mich. 874; ___ N.W.2d ___ (1996).

Petitioner has now filed a petition for writ of certiorari to the Michigan *Supreme* Court in which he attempts to raise federal constitutional issues which he failed to previously present to the lower state courts.

## REASONS FOR DENYING THE WRIT

### I.

### THIS COURT SHOULD DECLINE TO GRANT CERTIORARI WHERE PETITIONER HAS FAILED TO RAISE IN THE LOWER STATE COURTS THE FEDERAL ISSUES UPON WHICH HE NOW SEEKS REVIEW.

Petitioner seeks to have this Honorable Court grant his petition for certiorari to review questions allegedly arising under the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. However, as demonstrated by Respondent's recitation in the Statement of the Case above, Petitioner never raised *any* issues in the lower courts regarding the Fifth, Ninth, or Fourteenth Amendments. The only issue he raised concerning the First Amendment dealt with the right to free speech rather than a right of privacy or personal autonomy which gives rise to a constitutional right to commit suicide *with assistance*, and this issue was *not* raised in his appeal to the Michigan Court of Appeals.[1]

[1] Petitioner claims in his Petition (p 4) that he sought review in the Michigan Court of Appeals arguing that the

It is axiomatic that this Court will not consider for the first time on petition for writ of certiorari issues which have not been presented to, and ruled upon by, the lower courts. *Bankers Life & Casualty Co.* v *Crenshaw*, 486 U.S. 71, 76-77, 108 S. Ct. 1645, 100 L. Ed. 2d 62 (1988). Since Petitioner never presented his Fifth, Ninth, or Fourteenth Amendment claims to the lower state court, and since the ruling of the Michigan Court of Appeals (upon which he seeks this Honorable Court's grant of discretionary review) never addressed these unpresented and unpreserved claims, this Honorable Court should decline to address them.

Even the First Amendment claim Petitioner belatedly sought to raise in the Michigan Supreme Court is not deserving of review by this Honorable Court. First, it was not raised in his appeal to the Michigan Court of Appeals and was not considered or ruled on by that court. Second, although presented to the Michigan Supreme Court, since that court summarily denied review, the issue was never considered or ruled upon by that court either. Finally, there is no merit to Petitioner's claim, and thus no reason to grant review.

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injunction violated his right to freedom of speech. He cites in support a page from his application to the Michigan *Supreme* Court. (App. A-31) Thus his claim that "The Court of Appeals utterly failed to address the Freedom of Speech issue." (Pet. p 5) is only accurate if one recognizes that Petitioner "utterly failed" to raise the issue in the Court of Appeals and therefore that Court could not address it.

The injunctive order clearly states:

> IT IS HEREBY ORDERED that for the reasons set forth in this Court's Opinion of February 5, 1991, Defendant Dr. Jack Kevorkian, his agents, and employees, and those in active concert or participation with him, shall be and hereby are permanently enjoined from: using, employing, administering, offering, or providing any of his "suicide machines", or other similar devices, contrivances, or other modalities or drugs (including nonprescription drugs) on, or to, any persons seeking to end a human life, or conducting any acts to help a patient commit suicide regardless of the modality employed.

[Petitioner's Appendix, A-2]

This Honorable Court will search in vain for any prohibition on Petitioner's right of free speech in the above injunction. Petitioner is not forbidden from speaking about, writing about, or advocating on the topic of "assisted suicide." Nor is he forbidden from counseling persons seeking to end their lives. Petitioner is solely forbidden from "*using, employing, administering, offering, or providing* any of his suicide machines . . . on, or to, any persons seeking to end a human life". This ban is directed at acts, not speech. Petitioner provided poison and a poison dispensing "death machine" to a woman in the early stages of Alzheimer's disease and assisted this woman to utilize the machine in order to kill herself. She was not terminally ill; she was not suffering any physical or mental pain. It was these *acts* which the Oakland County Circuit Court enjoined – not Petitioner's advocacy of assisted suicide, or his writing or speech-making

on this topic.[2] The *acts* of direct assistance were, and are, criminal under the law of the State of Michigan. *People* v *Kevorkian*, 447 Mich. 436, 445; 527 N.W.2d 714 (1994), cert den ___ U.S. ___, 115 S. Ct. 1795, 131 L. Ed. 2d 723 (1995).

Therefore, none of Petitioner's claims was presented to, or decided by, the state courts. This Honorable Court should therefore adhere to its settled practice and decline to review claims which were not presented or decided below. *Wilson* v *Cook*, 327 U.S. 474, 480-484, 66 S. Ct. 663, 90 L. Ed. 62 (1946).

This Honorable Court should also note that it declined to grant certiorari in the criminal case wherein Petitioner's due process and equal protection claims were properly presented. *People* v *Kevorkian, supra*. It makes little sense to refuse to review federal claims in a case where they were properly raised and decided, and then to grant certiorari to review such claims in a case where they were never presented to, or decided by, the lower state courts.

Furthermore, this Honorable Court may note that Petitioner's due process and equal protection claims have

---

[2] Petitioner offers the example of a young man who published a description of how a homemade nuclear bomb could be constructed and asserts that his own publications and advocacy work are similarly protected by the First Amendment. (Pet., at 21 n 7.) What Petitioner fails to grasp, however, is that an injunction could be issued against the young man in his illustration if he had attempted to build or use his nuclear device. Likewise, the injunction issued in the instant case could properly forbid construction, provision, or use of Petitioner's death machines without interfering with his First Amendment rights.

been properly preserved and presented in the pending petitions for certiorari in *Vacco* v *Quill*, 80 F.3d 716 (CA 2, 1996) (cert pending, U.S.S.C. no. 95-1858) and *Washington* v *Glucksberg*, 79 F.3d 709 (CA 9, 1996) (cert pending, U.S.S.C. no. 96-1110). Thus these claims will not evade review should this Court determine that the time is ripe to decide them.

Finally, Petitioner asserts that his petition for certiorari should be granted because "The Question Herein is Important." (Pet., at p 24) The issue in this case is one of state law: does a state trial court have the authority to issue an injunction against the commission of illegal acts by an unlicensed doctor which are outside the spectrum of recognized and accepted medical practice and which inevitably result in the death of the patient? With all due respect to this Honorable Court, this question is a matter of state law which does not raise justiciable federal constitutional issues.

The larger question which Petitioner wants this Court to address is a matter for the legislature, and should, under our scheme of representative democracy, be left to the legislative branch for resolution, subject, of course, to constitutional review by the judicial branch.

For the above reasons, Respondent respectfully submits that the issues presented by Petitioner are not properly preserved for review in this Court, that they are without merit, and that the constitutionality of the practice of so-called "assisted suicide" is properly before this Court in two federal cases, and may be resolved in those cases. This Court should therefore decline to grant certiorari in the instant case.

## CONCLUSION

WHEREFORE, Petitioner Richard Thompson, Prosecuting Attorney in and for the County of Oakland, by Richard H. Browne, Assistant Prosecuting Attorney, respectfully requests this Honorable Court to deny Petitioner Kevorkian's petition for writ of certiorari to review the decision of the Michigan Court of Appeals.

Respectfully submitted,

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